Easements can be created by a writing, such as by deed, agreement, plat or will, etc., the same ways as title to land may be conveyed (see chapter on Written Conveyances). These are called easements by grant. Easements can also be created by unwritten methods such as by prescription, implication, and estoppel, to be discussed in this chapter.

This chapter will provide six sections as follows: (1) 'Easements in General'. This section will provide definitions commonly used and will briefly discuss the generalities of an easement; (2) 'Prescriptive Easements' will discuss the elements required to establish an easement by prescription and the location of prescriptive easements; (3) 'Implied Easements' will discuss the requirements to create an easement by implication; (4) 'Ways of Necessity' will discuss the circumstances required for a private way of necessity; (5) 'Easements by Estoppel thru Parol License' will show how verbal permission or acts of one party can create a license which can ripen into an easement by the application of the doctrine of estoppel; (6) 'Licenses' will briefly discuss definitions and the nature of licenses.

EASEMENTS IN GENERAL

Some definitions that will be helpful are:

Servitude is defined as; A burden which exists upon one estate for the benefit of another. "Servitude" is distinguished from "easement" in that servitude refers to the burden while easement refers to the benefit.

Servient tenement is defined as; The parcel of land which is burdened by a servitude. Generally speaking it is the estate which is subject to an easement.

Dominant tenement is defined as; The parcel of land which is benefited by a servitude. Generally speaking this is the owner or user of an easement.

Also with respect to servitudes, they can be classified as positive or negative. A positive servitude is where the owner of the servient estate is subject to another person or estate having the right to use the property in some manner. A utility easement for example, is a positive servitude. Whereas a negative servitude is such that the owner of the servient estate is restricted in some manner from using his property. A setback or restrictive covenant is a negative servitude.

Easement is defined as; A right one person or estate has in the estate of another. An easement must be for a special purpose and not inconsistent with the general use of the servient tenement.

The Arizona case of Kruckmeyer v. Laurence v. Lawyers Title of Arizona, 124 Ariz. 488, 605 P.2d. 466 simply defines an easement as a:

"....right which one person has to use the land of another for a specific purpose."

The case of Korricks Dry Goods Co. v. Kendall, 33 Ariz. 325, 264 P.2d. 692 discusses "easement" as follows:

"It is therefore, merely a question whether the drain in controversy constitutes a servitude, which is the term used in the civil law to express the idea conveyed by the word "easement" in the common law and may be defined as a right in the owner of one parcel of land, by reason of his ownership, to use the land of another for a special purpose of his own, not inconsistent with the general property in the owner." (underlines added for emphasis).

Whether a servitude is positive or negative still has a resulting effect which is to establish a positive easement (utility) or a negative easement (setback). When performing a survey due consideration should be given to keep an eye out for both types of easements, if required for a particular survey (see chapter on A Standard of Care).

With the use of solar panels and T.V. satellite receivers becoming common place in today's age, the possibilities for 'negative easements' are increased. Solar panels and T.V. dishes require certain unobstructed lines of sight to the sun and satellites. The surveyor may be called upon to determine angles above the horizon for certain time periods that will accomodate full usage of these facilities, and then be required to write legal descriptions for those areas that need to remain unobstructed. It is also possible to have 'prescriptive', 'implied' or 'estoppel' easements to accommodate such facilities. The surveyor should always be aware of situations that could create these unwritten 'negative easements'.

Some other definitions are:

"Apparent easement" - One that from a visual inspection of the physical condition of real estate or instruments relating to real estate, there exists evidence that reasonably might be interperted with conclusion that an easement or other servitude may exist upon one of the tenements.

"Appurtenant easement" - An easement which is necessary to the purpose for which it was created and runs with the land, and this type of easement is appurtenant to the land.

"Easement in gross - An easement in gross is not appurtenant to the land. It is a mere personal priviledge and usually ceases when the grantee dies.

With respect to "appurtenant easement" and "easement in gross", the case of Solana Land Co. v. Murphey, 69 Ariz. 117, 210 P. 2d. 593 states as follows:

"With an appurtenant easement two distinct tenements are involved, the dominant to which the right belongs and the servient upon which the obligation rests....Ballard on the Law of Real Property, Vol. 2, Section 176, p. 193, best distinguishes between ways appurtenant or in gross. We quote: "A right of way appurtenant is a right which inheres in the land to which it is appurtenant, is necessary to its enjoyment, and passes with the land, while a right of way in gross is a mere personal privilege, which dies with the person who may have acquired it. Ways are said to be appendant or appurtenant when they are incident to an estate, one terminus being on the land of the party claiming. They must inhere in the land, concern the premises, and be essentially necessary to their enjoyment."

Generally speaking an easement that cannot be shown to be a mere personal priviledge will be considered an easement appurtenant. The courts do not favor easements in gross and they must be proven to be such. When there is doubt whether the easement is an easement appurtenant or an easement in gross, it will be presumed to be an easement appurtenant . See 25 Am.Jur.2d., Easements and Licenses, section 13, page 13.

PRESCRIPTIVE EASEMENTS

This section will discuss how prescriptive easements are created in Arizona and how they are located. It will be shown that the elements required to establish title by adverse possession are the same elements as required to create an easement by prescription. The elements of adverse possession will not be discussed in detail as a thorough discussion can be found in the chapter on Adverse Possession.

How created

A prescriptive easement is an easement acquired by use and not by a grant such as a deed. The use must be of the same character and containing the same elements as required to establish title by adverse possession (see chapter on Adverse Possession), that is, open and notorious possession, hostile possession, under a claim of right and continuous for the statutory time period. Fee title is not transfered.

Arizona courts state:

"....the time fixed by the statute of limitation fixes the time for acquiring by prescription an easement of use." Gusheroski v. Lewis, 64 Ariz. 192, 167 P.2d. 390.

"A private right of way of this kind may be acquired under our statutes by peaceable and adverse possession and use the enjoyment thereof for ten years." Curtis v. Southern Pacific Company, 39 Ariz. 570, 8 P.2d. 1078.

"In order for plaintiff to acquire these easements by prescription over unenclosed land his use of the land must have been hostile to the defendants." England v. Ally Ong Hing, 105 Ariz. 65, 459 P.2d. 498.

"It is only the use of the land which must be shown to be open, notorious and adverse in order to establish an easement thereon." Etz v. Mamerow, 72 Ariz. 228, 233 P.2d. 442.

"The burden was, of course, upon the defendants to prove all of the requirements essential to establishing title by adverse possession or an easement by prescription. The elements necessary to establish each of these are substantially the same, and the rules of law relating to title by adverse possession are, in general, applicable to easements by prescription. Lewis v. Farrah, 65 Ariz. 320, 180 P.2d. 578. (underlines added for emphasis).

And finally in the case of LaRue v. Kosich, 66 Ariz. 299, 187 P.2d. 642, cites the case of Thomas v. England, 71 Cal. [456] 459, 12 P. 491, which states as follows:

"The burden is upon the party who claims title by prescription to clearly prove by competent evidence all the elements essential to such title. The user must have been adverse to the true owner, and hostile to his title. It must have been actual, continued, open, and under a claim of right. It must have all the elements necessary to acquire title by adverse possession." (underlines added for emphasis).

Burden of proof

As stated in the last two cases, the burden of proof is upon the party claiming the easement. This also holds true for adverse possession. This is addressed further in the case of Lewis v. Farrah, supra, as follows:

"And so far as easements by prescription are concerned, there is no presumption of easement until the claimant has shown adverse user for the required period of time by clear and positive proof." (underlines added for emphasis).

The case of Krencicki v. Petersen, 22 Ariz. App. 1, 522 P.2d. 762, also addresses this issue as follows:

"....The burden is upon the party who claims title by prescription to clearly prove by competent evidence all the elements essential to such title."

The court in Krencicki v. Petersen then went on to say:

"....easements by prescription are not favored because of the losses or forfeiture of rights inflicted upon others."

Exclusiveness not a requirement

One element required to obtain title by adverse possesion is that the possession be exclusive to the possessor. This is not a requirement for gaining title to a prescriptive easement. The case of Etz v. Mamerow, supra, states as follows:

"An allegation of exclusive possession is wholly inconsistent with the theory of establishing an easement."

Permissive use

There cannot be permissive use of the area being claimed by prescription. Permission to use the land creates a situation of a license. But, this permission, or parol license may actually ripen into an easement. This would be through the application of estoppel, to be discussed later in this chapter. Permissive use removes any adverse claim of right. Permission will not be presumed. Permissive use is addressed as follows:

"....in the absence of evidence that the use was permissive, such evidence was sufficient to sustain a judgement quieting title to the easement." Gusheroski v. Lewis, supra. (underlines added for emphasis).

"It is a recognized rule of law that where the use of a private way by a neighbor is by the express or implied permission of the owner, the continued use is not adverse and cannot ripen into a prescriptive right." LaRue v. Kosich, supra.

Location and Width

With respect to location and width of a prescriptive right, there has been somewhat different opinions in the courts. One view is that the lands within a defined possessionary boundary(such as fenceline to fenceline) is the area the prescriptive right will extend to. Conversely, some courts have held that only the actual area that has been used, the beaten path, will be considered the limits of prescription. Arizona tends to consider the beaten path. In the case of Kencicki v. Petersen, supra, the appellants asserted a statement from the case of Hoffner v. Bittell, 198 Ky. 78, 248 S.W. 223 (1923) which stated as follows:

"It is of course true that a prescriptive easement in the lands of another is founded wholly upon use as a matter of right for the statutory period, but the extent of such use under claim of right is not necessarily measured by wagon tracks or beaten path. The extent of plaintiff's use...was unquestionably marked by fences, rather than wagon tracks...".

The court in Kencicki v. Petersen disagreed with this dictum and responded as follows:

"We are unable to find any Arizona case which would support such a rule of law as advanced by appellants. Neither are we ready to apply such a rule, namely, that in easements by prescription of a roadway the easement extends to the fences which might be on either side of the beaten path rather than to the beaten path or actual part used for the roadway."

The court then quoted from the case of Sunnybrook Groves, Inc. v. Hicks, Fla. App., 113 So. 2d. 239 at page 242 (1959), where it was said:

"A prescriptive easement being limited to the actual length and width of the road used through the years,...".

In conclusion, the case of Kencicki v. Petersen states:

"It is our position that the rule of law should be that where evidence is in conflict as to the prescriptive easement, the trial court is not bound by the position of fences in determining the size of the roadway existing between them. If evidence exists which establishes that a certain portion of the roadway was not utilized by those seeking the easement by prescription, or which indicates the entire roadway may not have been traveled upon, then the trial court can in its discretion award that portion of the roadway which it has determined has clearly met the requirements of obtaining an easement by prescription."

And finally, an interesting case involving location is that of England v.Ally Ong Hing, supra, where the easement was simply defined as "20 feet in width and centered upon the main stream or flow line of WALNUT CREEK***."

Conclusion of section on prescriptive easements

In conclusion, the surveyor, when investigating the possibilities of whether a prescriptive easement exists, must gather sufficient evidence to help support the claim of the easement. The surveyor should: (1) determine who has used the area in question, (2) determine how long the area in question has been used, (3) determine if there has ever been any express or implied permission given by the owner of the land to use the area in question, (4)determine the limits of the area that appears to have been used, and (5) investigate all other elements required for acquiring title by adverse possession.

With respect to location, it is clear that actual use will always be a consideration. Anything beyond the width actually used is subject to other considerations. Since there could be some question as to what has actually been used or what is necessary for the proper continued use of the easement area, the surveyor should locate all conditions that could lead to different locations or widths and clearly show these different lines on the survey plat.

With respect to prescription, easements acquired by grant or operation of law can be lost by what is known as reverse prescription, or inverse prescription. This is discussed in the chapter on Extinguishment of Easements.

IMPLIED EASEMENTS

An implied easement is an unwritten easement which may be created when certain conditions are present at the time of a conveyance.

An implied easement is based upon the principle that when an owner of a parcel of land sells a part of the whole tract or tracts owned, he implies that a grant of an easement for all visible evidence of apparent easements which are necessary for the reasonable use of the property are conveyed with the property. These easements are not mentioned in the deed and are implied as a result of the transaction. It is based upon the fact that a reasonable and prudent man would view the land before purchase and see physical evidence of apparent easements, believing there to be an easement included with the transaction.

Creation of implied easement

Implied easements can be created in favor of the grantor or the grantee. They can only be created when there is a single parcel of land and a subsequent severance of a part of the original tract occurs. Unity of title coupled with an apparent servitude on one part of the severed parcel which benefits the remainder creates the atmosphere required for an implied easement. If it can be shown that the intention of the parties was not to convey an easement then there will be no easement by implication. Implied easements are not favored by the courts.

There appears to have been only one case in Arizona to date which discusses implied easements. That is the case of Porter v. Griffith, 25 Ariz. App. 300, 543 P.2d. 138. The court in this case relied on several other sources for it's decision. In this case the court stated:

"....an implied easement is based on the theory that whenever one conveys property he includes or intends to include in the conveyance whatever is necessary for its beneficial use and enjoyment....Whether an easement arises by implication depends on the intent of the parties which must clearly appear to sustain an easement by implication." (underlines added for emphasis).

With respect to the requirements for establishing an easement by implication, the case of Porter v. Griffith quotes from Wetmore v. Ladies of Loretto, Wheaton, 73 Ill. App. 2d. 454, 220 N.E. 2d. 491 (1966), as follows:

"(1) The existence of a single tract of land so arranged that one portion of it derives a benefit from the other, the division thereof by a single owner into two or more parcels, and the separation of title; (2) before the separation occurs, the use must have been long, continued, obvious or manifest, to a degree which shows permanency; (3) the use of the claimed easement must be essential to the beneficial enjoyment of the parcel to be benefited."

The key elements for establishing an implied easement can be summarized as:

(1) The use must have existed prior to separation of title.

(2) The use of the easement must be necessary to the benefit of the parcel claiming the easement.

(3) An easement must have been intended with the conveyance.

(4) There must have been unity of title and subsequent separation of the title.

(5) A servitude must be placed on one part of the severed land in favor of the other part.

The surveyor should always look for conditions that could create an implied easement. During the course of a survey, if physical usage of the parcel being surveyed is encountered, always gather facts about the use. Carefully review title reports to see if unity of title previously existed. This is done anyway when the surveyor checks for senior rights. Inform your client of a potential implied easement when doing a land split, so future litigation involving an implied easement may be avoided. Remember, courts do not favor implied easements.

WAYS OF NECESSITY

Definition

A way of necessity arises when a parcel of land conveyed is completely surrounded by the grantor or other landowners. The law implies that a private ingress-egress, or right-of-way actually was granted to the "landlocked" parcel from the original tract as appurtenant to the parcel and necessary for its beneficial use. A way of necessity cannot be one of convenience. It cannot be claimed when the parcel requiring the way of necessity became landlocked thru failure of the grantor to reserve a right-of-way. A way of necessity ceases when the necessity ceases.

The basis for a way of necessity revolves around the idea tha whenever one party conveys property, they convey whatever is necessary for the beneficial use of the property. A way of necessity is also supported by public policy which suggests that land should not be rendered unfit for residence or cultivation.

Statutes

The following are the current Arizona Revised Statutes, 12-1201 and 12-1202:

§ 12-1201. Private way of necessity defined

"Private way of necessity" as used in this article means right of way on, over, across, or through the land of another for means of ingress and egress, and the construction and maintenance thereon of roads, overhead transmission lines, pole lines, power lines, canals, ditches, flumes, shafts, tunnels, pipe lines, drains, including, but not limited to, embankments, diversion dams, dikes, ditches, canals, flumes and levees for the purpose of removing water from land or preventing accumulation of water on land, and tramways, including, but not limited to, aerial tramways and industrial railroads, for mining, milling, lumbering, agricultural, domestic or sanitary purposes.

§ 12-1202. Right to private way of necessity; limitation

A. An owner of or a person entitled to the beneficial use of land, mines or mining claims and structures thereon, which is so situated with respect to the land of another that it is necessary for its proper use and enjoyment to have and maintain a private way of necessity over, across, through, and on the premises, may condemn and take lands of another, sufficient in area for the construction and maintenance of the private way of necessity.

B. If the condemnation is upon, over, or affects the range lands of another, the area condemned shall be strictly defined, and livestock driven upon or over the private way shall be accompanied by and under the control of sufficient drivers or herders to confine the livestock to the condemned area, and the livestock shall be so confined to that area and kept moving directly across the property condemned until they have been completely removed from the condemned area.

Limitations and degree of necessity

Under Arizona statutes it may appear that anyone can easily condemn another for a private way of necessity. This is not absolutely true! Certain limitations have been applied. The following case of Gulotta v. Triano, 125 Ariz. 144, 608 P.2d. 81 states:

"A landowner may not acquire a way of necessity over another's property after he has voluntarily cut off an alternate means of access to his own property....Defendant's right not to have their property condemned except under circumstances authorized by law is constitutional and should not be lightly regarded or swept away merely to serve convenience and advantage....A statute giving a landlocked owner the right to a way of necessity over the lands of a stranger is in derogation of the common law and as such is strictly construed."

In this case Justice Richmond held that; "one who has landlocked his property by voluntary alienation of a means of ingress and egress may not thereafter acquire a private way of necessity over other land by condemnation."

The statement which refers to the statute "giving a landlocked owner the right to a way of necessity over the lands of a stranger" being "in derogation of the common law", is refering to other limitations applied to requests for ways of necessity. These limitations are set according to common law.

The courts are split as to the degree of necessity that is required in order to create the implied need. Some jurisdictions require a "reasonable necessity" while others maintain a strict requirement to have "absolute necessity".

The Arizona case of Gulotta v. Triano, supra, did declare interpretation of the common law in the strict sence, however, the following case of Chandler Flyers, Inc. v. Stellar Development Corporation, 121 Ariz. 553, 592 P.2d. 387, states as follows:

"As both parties recognize, the standard for imposing an easement of necessity is whether such an easement is required in order to provide reasonable access to property. See Solana Land Co. v. Murphey, 69 Ariz. 117, 125, 210 P.2d. 593, 598 (1949), construing Arizona's Statutory private way of necessity provisions, A.R.S. 12-1201 and 1202. Absolute necessity is not required. The owner need not show that without the easement there is no access whatsoever to the property....The standard set forth in the Restatement, Property, 476, p.2984, is that an easement of necessity will be implied if "without it the land cannot be effectively used."....Courts have denied easements of necessity where there was reasonable access to the property even in situations where denial of the easement caused considerable hardship."

In contrast, the prementioned case of Solana Land Co. v. Murphey also states:

"Furthermore, for a landowner to condemn a right-of-way across intervening land to a public road, he need not show that he has no outlet, but only that he has no adequate and convenient one....In other words the condemor need not show an absolute necessity for the taking, a reasonable necessity being sufficient."

Conditions required to create a way of necessity

The question comes down to this; under what circumstances can a person condemn for a "private way of necessity"? The following will summarize:

(1) Where a condemnor is "land-locked", he may condemn for a "private way of necessity", provided he did not voluntarily land-lock himself; (2) There must not be an existing "adequate outlet". The condemnor must show at least a "reasonable necessity" to make beneficial use of the land. Condemnation for the purposes of easier or more convenient access will usually not be sufficient. This rule is the most variable; (3) The necessity must exist by some implied situation at the time of the original conveyance of the land-locked parcel.

The role of the surveyor in ways of necessity

While performing a land survey the surveyor will certainly be able to determine if the property surveyed is "land-locked". It is a surveyor's duty and obligation to note whether there are ways of ingress-egress to and from the property surveyed. Precise location of driveways, roads, paths, etc. is not necessary, unless expressly provided for in the contract. The surveyor should as a minimum put a statement on the plat as to the existence or non exsistence of access. The surveyor is perhaps the only person to view the property and notify the client to possible problems of getting to the property, before substantial improvements are planned. If the surveyor does locate access ways, always be sure to take careful, accurate measurements. If the survey is used in a condemnation for a way of necessity, the road as located will absolutely control. The case of Solana Land Co. v. Murphey, supra, discusses this as follows:

"On the matter of selection of the route to be condemned the condemnor makes the initial selection and in the absence of bad faith, oppression or abuse of power its selection of route will be upheld by the courts."

Since the condemor and the court will rely on the location provided by the surveyor, this location better be correct, as it will be unalterable after the decree.

Sale of a landlocked parcel of land

The following Arizona Revised Statute (A.R.S. 32-2185.02) applies to the sale of a parcel of land which has been subdivided.

§ 32-2185.02. Permanent access to subdivided land

A. No subdivided land may be sold without provision for permanent access to the land over terrain which may be traversed by conventional motor vehicle unless such provision is waived by the commissioner.

B. Any sale of subdivided land which is without permanent access is voidable by the purchaser.

Added by Laws 1972, Ch. 110, § 38. Amended by Laws 1973, Ch. 129, § 3; Laws 1977, Ch. 153, § 11, eff. June 6, 1977.

Although this statute does not address obtaining a way of necessity, it clearly establishes that access must be provided to subdivided land.

EASEMENT BY ESTOPPEL THRU PAROL LICENSE

The chapter on Estoppel should be studied to provide an understanding of the doctrine of estoppel.

Easement by estoppel is one where a landlord voluntarily imposes a servitude or an apparent servitude upon his own property. Another person aware of the apparent servitude and believing that the servitude is permanent then reasonably acts in a way that he would not have done had he known the servitude was not real and permanent, or if there was some type of reliance on permission granted, and the landlord does nothing to prevent such reliance by the other person, then there is an irrevocable license. This irrevocable license essentially ripens into a grant or easement.

Generally, what happens is that a landowner gives verbal permission to one party to make use of the landowner's property. The party at this point has a parol license. Once substantial improvements are made, or there is reliance on the permission granted, and the landowner has not prevented such positive action, then the license becomes irrevocable. It essentially ripens into a grant or easement.

The following will illustrate this:

"In some jurisdictions, where the licensee has acted under the license in good faith, and has incurred expense in the execution of it, by making valuable improvements or otherwise, it is regarded in equity as an executed contract and substantially an easement, the revocation of which would be a fraud on the licensee, and therefore the licensor is estopped to revoke it." As cited in the case of Coumas v. Transcontinental Garage, 230 P.2d. 748 (Wyo.) from 53 C.J.S., Licenses, section 90, p. 816.

"Where license is coupled with interest authority conferred is not merely permission but amounts to grant or easement." Ulan v. Vend-a-Coin, Inc., 27 Ariz. App. 713, 558 P.2d. 741, 5 A.L.R. 4th 1, (1976).

"The cases holding to this rule as to irrevocability of certain licenses proceed on two distinct theories, one theory being that when the licensee expends large sums of money in making the improvement, and such expediture is made without opposition by the licensor, the license becomes executed and, as such irrevocable; and that, in fact, what was at its inception a license becomes in reality a grant. The other theory and the reason most frequently given is that after the execution of the license, it would be a fraud on the licensee to permit a revocation; and the principles of equitable estoppel are invoked to prevent what would work a great hardship in many instances. This is especially true where a licensor not only grants the right to the licensee to go on his land but joins in the

enterprise and accepts the benefits of the licensee's labor and expense." Cited in the case of Keystone Copper Mining Co. v. Miller, 63 Ariz. 544, 164 P.2d. 603 from 33 Am.Jur., Licenses, section 103, page 408.

*See also Boyd v. Atchison, Topeka & Santa Fe Railway Company, 39 Ariz. 154, 4 P.2d. 670, in the chapter on Estoppel.

The role of the surveyor

As with estoppel, the surveyor, realtor or other party involved with a conveyance of land, should always be looking for situations that could create estoppel. The surveyor should always try to find out how, why and when apparent easements were created.

LICENSES (WITH RESPECT TO REAL PROPERTY)

A license in real property is a privilege to do certain acts, or to use the land for certain purposes while retaining no interests in the land. The primary difference between a license and an easement is that a license is a privilege whereas an easement is an interest in the land. Licenses can be created by a writing or by parol. Usually a license is revocable as the licensor sees fit. This rule is subject to the limitation that where the license is coupled with a grant or interest, or where the licensee has expended large sums of money or labor in pursuance of execution of the license.

The case of Tanner Companies v. Arizona State Land Department, 142 Ariz. 183, 688 P.2d. 1075, states:

"A license is an authority or permission to do a particular act or series of acts upon the land of another without possessing any interest or estate in such land."

As licenses are related to real property, and more specifically to those situations where a surveyor would encounter a possible license on a parcel of land, there is not a statute prohibiting the creation of a parol license.

BLANKET EASEMENTS-OTHER ARIZONA STATUTE

It is not clear whether this means that "blanket" easements, or easements that are not definite in description are invalid if executed after September 15, 1982. No cases were found addressing this statute while researching this section.

§ 33-403. **Easement description; validity**

Notwithstanding any other provision of law, the description of easements and rights-of-way for public service corporation, telecommunications corporation or cable television system purposes reserved or conveyed in a conveyance document or other instrument executed prior to September 15, 1982 is not void for lack of a sufficient description of the course or width of the easement if the servient estate which is subject to the easement or right-of-way is sufficiently described.

Added by Laws 1986, Ch. 264, § 2.

124 Ariz. 488

Harold T. LAURENCE and Meyer Z. Reuben, Plaintiffs/Appellants,

v.

Frederick KRUCKMEYER and Adrienne Kruckmeyer, husband and wife, Defendants/Appellees.

Harold T. LAURENCE and Meyer Z. Reuben, Plaintiffs/Appellants,

v.

LAWYERS TITLE OF ARIZONA, a corporation, Defendant/Appellee.

No. 2 CA-CIV 3300.

Court of Appeals of Arizona, Division 2.

Nov. 16, 1979.

Rehearing Denied Dec. 26, 1979.

Landowners brought action against adjacent landowners claiming a water right on the adjacent parcel, and brought action against title insurance company for alleged damages for breach of contract and negligence. The Superior Court, Pima County, Cause No. 177883, William E. Druke, J., granted defendants' motion for summary judgment, and plaintiffs appealed. The Court of Appeals, Hathaway, J., held that: (1) plaintiffs had no claim to water rights in the adjacent parcel where the easement under which they claimed such rights was merely concerned with laying of and maintenance of a water pipe, where none of deeds in chain of title to the parcels conveyed any interest in water rights in the adjacent parcel, and where no water rights were excepted, and (2) title insurance company properly disclosed the easement as an encumbrance against one of two parcels purchased by landowners.

Affirmed.

1. Easements ⇐1

An "easement" is a right which one person has to use land of another for a specific purpose.

See publication Words and Phrases for other judicial constructions and definitions.

2. **Waters and Water Courses ⇐156(1)**

Water rights in land must be conveyed in a deed.

3. **Waters and Water Courses ⇐156(5)**

Landowners had no claim to water rights in an adjacent parcel where easement under which they claimed such rights regarded merely the laying and maintenance of a water pipe, where none of deeds in chain of title to the parcels conveyed any interest in water rights in the adjacent parcel, and where no water rights were excepted in such deeds.

4. **Abstracts of Title ⇐3**

When a title insurer prepares a preliminary title report for a buyer, it has a responsibility to list all matters of public record regarding the subject property and a failure to list an easement constitutes a breach of duty.

5. **Abstracts of Title ⇐3**

Title insurance company did not breach duty to list in its title report a water pipe easement as an encumbrance against one of two parcels purchased by landowners, and the title policy was not required to mention the easement as it pertained to the other of landowners' two parcels and an adjacent parcel where only the first of landowners' parcels was burdened with the easement and the easement created no right to water on the adjacent parcel in the second of landowners' parcels.

Michael A. Blum, Tucson, for plaintiffs/appellants.

Schroeder & Murphy by Donald R. Schroeder, Tucson, for defendants/appellees Kruckmeyer.

Bilby, Shoenhair, Warnock & Dolph, P.C. by Mary E. Mangotich, Tucson, for defendant/appellee Lawyers Title.

OPINION

HATHAWAY, Judge.

Appellants seek review of two summary judgments against them: (1) in favor of appellees Kruckmeyer as to appellants' claim of a water right; and (2) in favor of appellee Lawyers Title for alleged damages for breach of contract and negligence. We agree with the trial court's rulings and affirm.

Three parcels of land, which in the interest of brevity we shall call A, B and C, are involved here. Appellants own parcels B and C and the Kruckmeyers own parcel A. Appellants allege that a controversy had arisen between themselves and the Kruckmeyers as to appellants' right to share in and use water from a well located on the Kruckmeyers' property. Their claim against Lawyers Title was that it had failed to discover the nature of the easement purchased by them and had failed to protect their rights; also, that Lawyers Title had negligently searched the title to appellants' land by failing to discover and inform them of the nature of the easement.

The following facts are undisputed and demonstrate that, as a matter of law, appellants had acquired no water rights in parcel A. In 1941, parcels A and C were owned by Helen Seifert. On August 14, 1941, Mary Frantz, owner of parcel B, deeded to Seifert the following easement:

"That in consideration of the sum of One Dollar ($1.00), the receipt of which is hereby acknowledged, the undersigned MARY A. FRANTZ does hereby grant and convey unto HELEN M. SEIFERT, a widow, her heirs, administrators, executors, and assigns, the right to lay, maintain, operate, repair and remove a water pipe through and over the following described real estate situated in Pima County, Arizona, to-wit:

[Legal description of parcel B]

The grantee herein shall have the right to select the route to be followed by said water pipe, but it is understood and agreed that the purpose of this grant is to allow the grantee to pipe water from the lands of the grantee in [parcel A], across the lands of the grantor above described into the lands of the grantee in [parcel C].

TO HAVE AND TO HOLD the said easement unto the said HELEN M. SEIFERT, her heirs, administrators, executors and assigns forever."

In 1956, Seifert conveyed parcels A and C and Frantz conveyed parcel B to the Eskins and Chesnicks. The deed to parcel B recited that the conveyance was subject to the right-of-way easement for a water pipeline from Frantz to Seifert, of record in the Office of the County Recorder of Pima County, Arizona, in Book 74, of Miscellaneous Records, at page 141.[1] In 1958, the Eskins and Chesnicks conveyed parcels B and C to Walker, the deed to parcel B again reciting that it was subject to the recorded easement to Seifert. One month later, parcel A was conveyed to Urquhart by the Eskins and Chesnicks.

On October 29, 1958, Walker conveyed parcel C to appellants and on November 26, 1958, Urquhart conveyed parcel A under a deed of trust to Tucson Title. On December 1, 1958, Walker conveyed parcel B to appellants subject, inter alia, to the Seifert easement to lay water pipe. In 1963, Tucson Title conveyed parcel A to the Lovetts who in 1965 conveyed it to the Kruckmeyers. The title insurance policy to parcels B and C issued by Lawyers Title to appellants on December 2, 1958, specifically recited that the title to parcel B was subject to the easement to Seifert to lay water pipes. The policy also specifically excepted water rights from its coverage.

[1–3] An easement is a right which one person has to use the land of another for a specific purpose. *Etz v. Mamerow*, 72 Ariz. 228, 233 P.2d 442 (1951). The 1941 easement from Frantz to Seifert merely burdened parcel B with the laying of and maintenance of a water pipe for the benefit of parcel C to enable Seifert to convey water from her parcel A to her parcel C. Water rights in land must be conveyed in a deed. *Neal v. Hunt*, 112 Ariz. 307, 541 P.2d 559 (1975); *George v. Gist*, 33 Ariz. 93, 263 P. 10 (1928). None of the deeds in the chain of title to parcels A, B and C convey any interest in parcel A water rights. Nor were any water rights excepted. As the chain of title for parcels A and C negatived appellants' claim to water rights in parcel A, the trial court properly granted the Kruckmeyers' motion for summary judgment.

[4, 5] We also find no error in granting Lawyers Title's motion for summary judgment. We agree with appellants that when a title insurer prepares a preliminary title report for a buyer, it has a responsibility to list all matters of public record regarding the subject property and a failure to list an easement constitutes a breach of duty. *Jarchow v. Transamerica Title Insurance Company*, 48 Cal.App.3d 917, 122 Cal.Rptr. 470 (1975); *Shotwell v. Transamerica Title Insurance Company*, 16 Wash.App. 627, 558 P.2d 1359 (1976). See also, *Phoenix Title & Trust Company v. Continental Oil, Co.* 43 Ariz. 219, 29 P.2d 1065 (1934). Lawyers Title did not breach this duty as it properly disclosed the easement as an encumbrance against parcel B. Appellants, however, complain of the fact that the title policy made no mention of the easement as it pertained to parcels A and C. There is no merit to this argument as only parcel B was burdened with the easement and, as discussed above, this easement created no right to the water on parcel A in parcel C.

Affirmed.

RICHMOND, C. J., and HOWARD, J., concur.

1. We need not decide the issue of merger here. See generally, 25 Am.Jur.2d, Easements and Licenses, § 108 (Supp.1979).

233 P.2d 442

ETZ et ux. v. MAMEROW.

No. 5279.

Supreme Court of Arizona.

July 2, 1951.

Rehearing Denied Sept. 25, 1951.

Action by Sarah J. Mamerow, formerly Sarah J. Pruitt, against W. H. Etz, and Helen Green Etz, husband and wife, to quiet title to property. The Superior Court of Maricopa County, Dudley W. Windes, J., rendered judgment for plaintiff, and defendants appealed. The Supreme Court, Phelps, J., held that where plaintiff's pleadings and proof showed a claim to disputed property by virtue of adverse possession, the trial court erred in granting plaintiff an easement over the disputed property, since the proof necessary to establish an easement was not necessarily the same proof required for the establishment of title to property.

Judgment reversed with directions.

1. Easements ⇐61(8)

An allegation of exclusive possession is wholly inconsistent with theory of establishing an easement.

2. Easements ⇐38

The right to possess, to use and to enjoy land upon which an easement is claimed remains in owner of fee except in so far as exercise of such right is inconsistent with purpose and character of easement.

3. Easements ⇐1

An "easement" is a right which one person has to use land of another for a specific purpose not inconsistent with a general property in the owner.

See publication Words and Phrases, for other judicial constructions and definitions of "Easement".

4. Easements ⇐8(1)

It is only use of land which must be shown to be open, notorious and adverse in order to establish an easement thereon.

5. Easements ⇐8(2)

Where use of a private way by a neighbor is by express or implied permission of owner, continued use is not adverse and cannot ripen into a prescriptive right.

6. Easements ⇐36(3)

In quiet title action, where plaintiff's pleadings and proof showed that plaintiff claimed title to disputed strip of property by adverse possession, trial court erred in granting plaintiff an easement over disputed property, since proof for establishment of an easement was not necessarily same as in establishment of title by adverse possession.

7. Appeal and error ⇐916(1)

When pleadings present affirmatively certain issues or limitations of issues, in order that Supreme Court should hold case was tried on any other theory, there must be some affirmative showing in record that such was fact and in absence of such a showing presumption is that case was tried on issues set forth in pleadings only.

Gust, Rosenfeld, Divelbess, Robinette & Linton, of Phoenix for appellants.

W. F. Dains, Curtis E. Weland, of Phoenix for appellee.

PHELPS, Justice.

This is an appeal from the judgment of the trial court and from an order denying appellant's motion for a new trial.

The cause was tried to the court without a jury upon a complaint to quiet title which must be construed under the evidence presented by plaintiff-appellee as being intended to state a claim of title by adverse possession against defendants-appellants to a strip of land three feet wide lying north of the north boundary line of Lot 10, Norma Place in Phoenix. The parties will be hereinafter referred to as plaintiff and defendants as they appeared in the trial court.

The pleadings are a bit confusing, in that, they allege that plaintiff is the owner in fee simple of Lot 10, Norma Place, according to the map or plat thereof, etc., and that the north boundary line of Lot 10 is three feet north of what defendants now claim is the north boundary line thereof along which they constructed the fence in question. Plaintiff alleges that up to September 25, 1948, she and her predecessors in interest had been in actual, open, exclusive and notorious possession of Lot 10 under a claim of right as against defendants (owners of Lot 12) and all the world during that period, exercising dominion over it and enjoying and using the same. (Incidentally the evidence shows plaintiff has owned and been in possession of Lot 10 since 1925 or 1926). She further alleges defendants claim some interest in this three-foot strip of land and that such claim is without right or foundation and they have no estate, right, title or interest therein.

In her first cause of action she asked that defendants and each of them be barred and forever estopped from having or claiming any right or title to said strip of land.

In her second cause of action she reincorporates the above allegations therein and further alleges that defendants, without her consent and over her protest, wrongfully and unlawfully entered and trespassed upon the three-foot strip of land on the north side of her premises and built a fence thereon which obstructs the ingress and egress of her tenants to her apartments located along the north boundary line of Lot 10. She asked damages therefor and for the removal of the fence and restoration of said land to her. Defendants denied all of the above allegations except that they claim title to the three-foot strip of land in question.

At the close of all of the evidence the court took the matter under advisement and thereafter entered judgment in favor of plaintiff and against defendants and each of them, finding that plaintiff is the owner of Lot 10, the north line of which is es-

tablished by the survey of Lot 12 on September 2, 1948, by F. N. Holmquist, acting for defendants Etz. This survey established the boundary line between Lots 10 and 12 to be along the line upon which defendants constructed the fence here involved and which approximately coincides with the original survey as shown by the map or plat of Norma Place. The judgment further found defendants to be the owners of Lot 12. It then found that plaintiff and her predecessors in interest had used a part of Lot 12, Norma Place, three feet wide lying north of the entire boundary line of Lot 10 for a period of more than 20 years and concluded as a matter of law that plaintiff had acquired an easement for the use of said strip of land. The court thereupon entered its order and decree establishing an easement in favor of plaintiff for the use of the three-foot strip of land on Lot 12 of Norma Place lying north of the north boundary line of Lot 10 extending along the entire length of said lots.

On her second cause of action judgment was entered against defendants ordering and directing them to remove the fence now encroaching upon said easement and for her costs.

No request was made to the court by plaintiff to amend her pleadings to conform to the evidence and as hereinafter pointed out, there is nothing in the record to indicate that the case was tried on any other theory than that of attempting to acquire title to the strip of land in question by adverse possession.

Defendants have presented five assignments of error for our consideration, all of which are directly or indirectly based upon the ground that the judgment rendered by the court was not within the issues raised by the pleading and is foreign to the theory upon which the case was tried.

We agree with this contention. As above stated the pleadings, if literally construed, would indicate that plaintiff was merely seeking to establish the true boundary line between Lots 10 and 12, Norma Place, according to the map or plat thereof to be three feet north of the line along which the newly constructed fence was located and to prevent defendants from further trespassing upon Lot 10 as fixed by the map or plat of Norma Place. This interpretation of the pleadings, however, was refuted by counsel for plaintiff during the trial.

The court asked counsel for plaintiff the following question: "Is there any dispute about what the true survey is, is there a dispute about what the true survey will show?"

After some discussion Mr. Daines said: "We have no survey to introduce in evidence which will show the north boundary of our lot to be three feet north of the line claimed by Mr. Etz. The fact is the recent surveys made show, the probabilities are, the line which Mr. Etz claims is es-

tablished by the survey of Mr. Holmquist and also by Mr. Jones." (Mr. Jones made the survey for plaintiff).

Mr. Daines then said: "* * * The probabilities are the best survey that can be made will show the line not far from where Mr. Etz claims it is."

By this statement to the court counsel made it clear that so far as the evidence was concerned it would show that the fence was approximately on the true boundary line between Lots 10 and 12 as indicated by the map or plat of Norma Place.

Plaintiff, knowing that the three-foot strip of land was in fact on Lot 12, and having alleged that she had been in peaceable, open, notorious, exclusive and continuous possession of said strip of land under a claim of right against defendants and all of the world, exercising dominion and using and enjoying the same, makes the conclusion inescapable that she was seeking to establish not an easement upon, but title to the three-foot strip of land involved by adverse possession.

[1-4] An allegation of exclusive possession is wholly inconsistent with the theory of establishing an easement. The right to possess, to use and to enjoy land upon which an easement is claimed remains in the owner of the fee except in so far as the exercise of such right is inconsistent with the purpose and character of the easement. Pinkerton v. Pritchard, 71 Ariz. 117, 223 P.2d 933; Langazo v. San Joaquin Light & Power Corp., 32 Cal.App.2d 678, 90 P.2d 825. An easement is a right which one person has to use the land of another for a specific purpose. Callan v. Walters, Tex.Civ.App., 190 S.W. 829. It is the right to use the land of another for a special purpose not inconsistent with a general property in the owner. It is distinguished from the occupation and enjoyment of the land itself. Wessels v. Colebank, 174 Ill. 618, 51 N.E. 639. It is only the use of the land which must be shown to be open, notorious and adverse in order to establish an easement thereon. Thus it will be seen that an action to establish an easement does not involve possession or occupation of the land. It does not involve the enjoyment of the premises except to the extent of the use claimed under the easement. It does not disturb the legal title of the premises except as it is limited by the character of the easement. It does not involve dominion over the premises except that which is necessary for the enjoyment of the use.

[5] Defendants in their cross examination of plaintiff limited their inquiry to whether or not plaintiff had ever made any demand upon defendants to stay off the three-foot pathway. This was designed to show by plaintiff's own statement that she had never asserted her claim that she was in open, notorious, exclusive, and hostile possession of the premises. This was a proper question under the theory that plaintiff was claiming title to the strip in question by adverse possession but it was not a proper question if plaintiff was seeking

only to establish an easement to use it for ingress and egress to her apartments. As pointed out by defendants in their brief, had they been advised that plaintiff was seeking only to establish an easement to use the three-foot strip of land they would have been required to go into the question of whether plaintiff had ever asserted to defendants a lawful right to use such pathway adverse to defendants' use or ownership, or if she had indicated in any way that her use thereof was hostile to defendants' use and ownership. The evidence is in conflict as to whether there ever was a fence running along the line between Lots 10 and 12. Under all of the evidence, however, there has been no fence between these lots since 1935 which is far in excess of the prescriptive period. At no time has plaintiff stated to defendants that her use of the pathway was hostile or adverse to defendants under claim of right or otherwise.

We said in LaRue v. Kosich, 66 Ariz. 299, 187 P.2d 642, 646, that: "It is a recognized rule of law that where the use of a private way by a neighbor is by the express or implied permission of the owner, the continued use is not adverse and cannot ripen into a prescriptive right. (Citing cases.) The law raises no presumption that the use is under a claim of right. (Citing cases.)"

In 17 Am.Jur., Easements, Sec. 71, p. 980, it is stated: "The prevailing principle seems to be that while a way may be acquired by user or prescription by one person over the unenclosed land of another, mere use of the way for the required time is not, as a general rule, sufficient to give rise to the presumption of a grant. Hence, generally some circumstance or act in addition to, or in connection with, the use of the way, tending to indicate that the use of the way was not merely permissive is required to establish a right by prescription. * * *"

[6] There is evidence in the record that in 1930 plaintiff placed concrete slabs along the pathway in the three-foot area some of which were 14 x 24 inches in size, to be used by her tenants in going to and from their apartments and the evidence further shows that the foot of the steps leading from the apartments in question are approximately on the boundary line between Lot 10 and 12 and that their enjoyment as such is, for all practical purposes destroyed by the construction of the fence on the true boundary line. These would be proper matters for consideration by the court under pleadings designed to establish an easement upon the strip in question. But whether these facts, standing alone, would be sufficient to establish such easement we express no opinion. We cannot agree with counsel for appellee that the proof would be the same in the establishment of an easement as in the establishment of title. We are fully aware of

our statement in the case of LaRue v. Kosich, supra, in which we stated: "The burden is upon the party who claims title by prescription to clearly prove by competent evidence all the elements essential to such title. The user must have been adverse to the true owner, and hostile to his title. It must have been actual, continued, open, and under a claim of right. It must have all the elements necessary to acquire title by adverse possession."

But as pointed out above it is only the use to which the premises are put which must be shown to be adverse, open and notorious. To the extent that the use is established, it, of course, is hostile to the title of the servient estate.

[7] We again reiterate what we said in Collison v. International Ins. Co., 58 Ariz. 156, 118 P.2d 445, 447, as follows: "* * * We think, however, that when the pleadings present affirmatively certain issues or limitations of issues, in order that we should hold the case was tried on any other theory, there must be some affirmative showing in the record that such was the fact, and that in the absence of such a showing the presumption is that the case was tried on the issues set forth in the pleadings only. * * *"

It is true that in the case last above cited the facts are entirely different from the facts in the instant case but the principle involved is identical. The record does not justify a judgment establishing an easement in this case.

Judgment reversed with directions to enter judgment in favor of defendants.

UDALL, C. J., and STANFORD, DE CONCINI and LA PRADE, JJ., concur.

22 Ariz.App. 1

Theodore KRENCICKI and Alice Krencicki, his wife; Frank E. Beghtel and Ruby M. Beghtel, his wife, Appellants,

v.

Frank W. PETERSEN and Oma B. Petersen, his wife, Appellees.

No. 1 CA-CIV 2369.

Court of Appeals of Arizona,
Division 1,
Department A.

May 21, 1974.

Rehearing Denied July 24, 1974.

Plaintiff sought prescriptive easement over road located on defendants' adjacent property. The Superior Court, Yuma County, Cause No. C-29846, John A. McGuire, J., granted easement over north half of road and refused to grant easement over south half of road, and appeal was taken. The Court of Appeals, Donofrio, P. J., held that determination that use of roadway was limited to narrow one-half road on north side of section line and did not extend to fence located on south side of section line was not clearly erroneous and that where evidence is in conflict as to the prescriptive easement the trial court is not bound by the position of fences in determining the size of the roadway existing between them.

Affirmed.

1. Estoppel ⇐68(4)

Concession of defendant property owners that area available for use by plaintiff adjacent property owners as roadway extended to south of section line did not preclude defendants from taking the position, in suit seeking to reestablish easement by prescription, that no part of the area available was utilized as a roadway. A.R.S. § 12-526.

2. Easements ⇐36(3)

Determination that although fence, which defendant property owners had constructed in 1953 at a point approximately five and one-half to six feet south of section line, had remained in such position until it was moved closer to section line in 1970, plaintiffs' use of adjacent area to the north was limited to a narrow one-way road on north side of section line and, thus, that easement for road did not extend south of section line and to fence as it had been constructed in 1953, was not clearly erroneous.

3. Easements ⇐44(2)

In easements by prescription of a roadway the easement does not extend to fences which might be on either side of a beaten path but is limited to the beaten path or actual part used for the roadway; where evidence is in conflict as to the prescriptive easement, the trial court is not bound by the position of fences in determining the size of the roadway existing between them; if evidence exists which establishes that a certain portion of the roadway was not utilized by those seeking the easement or which indicates entire roadway may not have been traveled on, the trial court can, in its discretion, award that portion of the roadway which it has determined has clearly met requirements of obtaining an easement by prescription.

4. Easements ⇐5

Easements by prescription are not favored because of the loss or forfeiture of rights inflicted on others.

5. Easements ⇐10(1)

To acquire a right-of-way by prescription the user must generally be confined to one definite and certain line or path.

David W. Adler, Phoenix, for appellants.

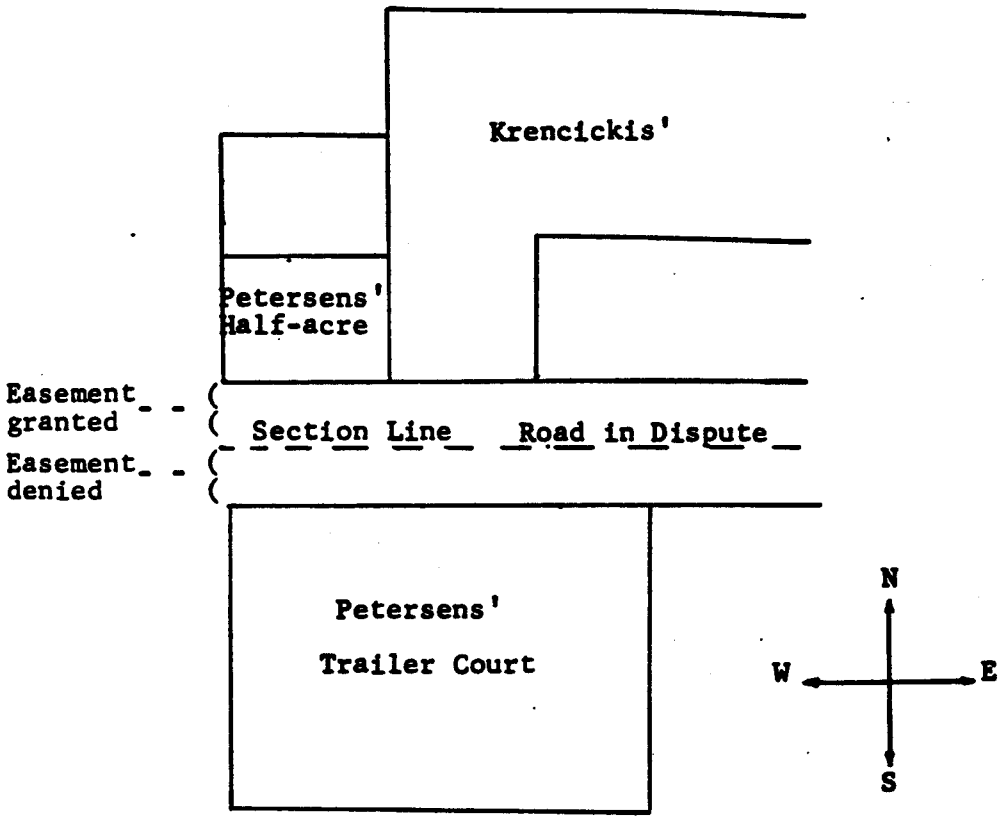
Byrne & Ellsworth, by David S. Ellsworth, Yuma, for appellees.

OPINION

DONOFRIO, Presiding Judge.

Theodore Krencicki and his wife, Alice Krencicki, plaintiffs-appellants, appeal from the judgment of the trial court granting them an easement by prescription over the north half of the road located on the half-acre property of defendants-appellees,

and the refusal to grant such an easement over the south half of the road which was situated on appellees' trailer court property. The following diagram, which is not to exact scale, is included to better illustrate the nature of the dispute.



Appellants essentially argue that the trial court's findings No. 5 and No. 10 are clearly erroneous. Finding No. 5 states:

> "That insofar as property in Section 28 is concerned, no private right-of-way in favor of plaintiffs by adverse use or otherwise has been established."

and finding No. 10 states:

> "That a reasonable width for a private driveway under the circumstances shown in this case is sixteen (16) feet."

It is asserted by the appellants that all the evidence showed that in 1953 when appellees bought their trailer court located in Section 28 they fenced it on the north at a point no less than five and one-half to six feet south of the section line between Sections 21 and 28. Furthermore, for no less than the next sixteen years that fence remained at the same location while appellants and their predecessors in interest used the road. In December of 1970 appellees moved this fence approximately four and one-half to five feet to the north, and approximately one foot south of the section line. Appellants claim this movement was approximately fifteen feet to the north, and that this action disturbed their peaceable use of the road and was the precipitating cause of this lawsuit.

[1] The crucial inquiry necessary for a correct analysis of this action is whether the trial court's findings that the road used by appellants and their predecessors in interest (the easement granted) extended only as far south as the section line is supported by the record. Appellees concede that the area available for a roadway extended to the south of the section line. This concession, however, does not preclude them from taking the position that no part of the area available was utilized as a roadway. They claim that appellants have failed in their proof to establish an open, notorious, uninterrupted, continuous use of the claimed easement south of the section line for a period in excess of ten years as specified in A.R.S. § 12-526. See Sparks v. Scottsdale Mortgage Corp., 1 Ariz.App. 8, 398 P.2d 916 (1965).

[2] Appellees thus assert that although the fence in question was approximately five feet south of the location to which it was moved in 1970, there is support in the record to show that the use was limited to a narrow one-way road on the north side of the section line. Our review of this almost 600-page transcript reveals a great conflict in the testimony of many witnesses. We cannot say that the trial court erred in concluding that the roadway existed only approximately up to the section line. There is basis in the record for upholding such a determination. In addition, we do not feel that appellants have met the requisite standard of proof to be awarded an easement south of the section line. In LaRue v. Kosich, 66 Ariz. 299, 187 P.2d 642 (1947), our Supreme Court quoted with emphasis from Clarke v. Clarke (citation omitted):

> ". . . The burden is upon the party who claims title by prescription to *clearly* prove by competent evidence all the elements essential to such title. The user must have been adverse to the true owner, and hostile to his title. It must have been actual, continued, open, and under claim of right . . . ." (emphasis ours) 66 Ariz. at 303, 187 P.2d at 645.

To support their claim for granting an easement up to the point where the original fence had been located, appellants have relied upon the case of Haffner v. Bittell, 198 Ky. 78, 248 S.W. 223 (1923) in which it was stated:

> "It is of course true that a prescriptive easement in the lands of another is founded wholly upon use as a matter of right for the statutory period, but the extent of such use under claim of right is not necessarily measured by wagon tracks or beaten path. The extent of plaintiffs' use . . . was unquestionably marked by fences, rather than wagon tracks. . . ." 248 S.W. at 223.

[3-5] We are unable to find any Arizona case which would support such a rule of law as advanced by appellants. Neither are we ready to apply such a rule, namely, that in easements by prescription of a roadway the easement extends to the fences which might be on either side of the beaten path rather than to the beaten path or actual part used for the roadway. 25 Am.Jur.2d, Easements, Sec. 39 states the general rule that easements by prescription are not favored because of the losses or forfeiture of rights inflicted upon others. Furthermore, to require a right-of-way by prescription, the user must generally be confined to one definite and certain line or path. 25 Am.Jur.2d, Easements & Licenses, Sec. 63. Supporting this view is Sunnybrook Groves, Inc. v. Hicks, Fla.App., 113 So.2d 239 at page 242 (1959) where it is stated:

> "A prescriptive easement being limited to the actual length and width of the road used through the years, . . ."

It is our position that the rule of law should be that where evidence is in conflict as to the prescriptive easement, the trial court is not bound by the position of fences in determining the size of the roadway existing between them. If evidence exists which establishes that a certain portion of the roadway was not utilized by those seeking the easement by prescription,

or which indicates the entire roadway may not have been traveled upon, then the trial court can in its discretion award that portion of the roadway which it has determined has clearly met the requirements of obtaining an easement by prescription.

We agree with the judgment of the trial court in its determination that the roadway utilized by the appellants during the prescriptive period extended south as far as the section line.

The matter is therefore affirmed.

JACOBSON, Chief Judge, Division I, and OGG, J., concur.

543 P.2d 138

Ella PORTER, a widow, and James R. Pryor, a single man, Appellants,

v.

Oliver H. GRIFFITH and Josie Griffith, his wife, Appellees.

No. 1 CA-CIV 2789.

Court of Appeals of Arizona,
Division 1,
Department A.
Dec. 9, 1975.

Plaintiffs brought action seeking an order granting an easement by implication over the property of the defendants. The Superior Court, Maricopa County, Cause No. C-276217, Warren L. McCarthy, J., entered judgment for the plaintiffs, and the defendants appealed. The Court of Appeals, Ogg, P. J., held that where plaintiffs bought their parcel of land one year after the defendants had bought theirs, where defendants were never in privity with the plaintiffs as to any conveyance, and where there was no evidence to indicate that the original owner of both parcels ever used defendants' parcel to his benefit, the plaintiffs had no right to expect that an easement was implied over the defendants' property when they bought their parcel and were not entitled to an implied easement over defendants' parcel.

Reversed.

1. Easements ⇐16

The essential elements of an implied easement are: the existence of a single tract of land so arranged that one portion of it derives a benefit from the other, the division thereof by a single owner into one or more parcels and the separation of title; before the separation occurs, the use must have been long, continued, obvious or manifest, to a degree which shows permanency; the use of the claimed easement must be essential to the beneficial enjoyment of the parcel to be benefited; and the easement must have been created in connection with a conveyance.

2. Easements ⇐16

An implied easement is based on the theory that whenever one conveys property he includes or intends to include in the conveyance whatever is necessary for its beneficial use and enjoyment.

3. Easements ⇐15

Whether an easement arises by implication depends on the intent of the parties which must clearly appear to sustain an easement by implication.

4. Easements ⇐16

Where plaintiffs bought their parcel of land one year before defendants had bought theirs, where defendants could never have intended an easement over their land since they were never in privity with the plaintiffs as to any conveyance, and where there was no evidence to indicate that the original owner of both parcels, who reserved no easement over defendants' land when he sold it and retained plaintiffs' parcel, ever used defendants' parcel to his benefit, the plaintiffs had no right to expect that an easement was implied over the defendants' property when they purchased their parcel and were not entitled to an implied easement over defendants' land.

Behrens MacLean & Jacques by John K. Graham, Phoenix, for appellants.

Biaett & Bahde by Kenneth Biaett, Phoenix, for appellees.

OPINION

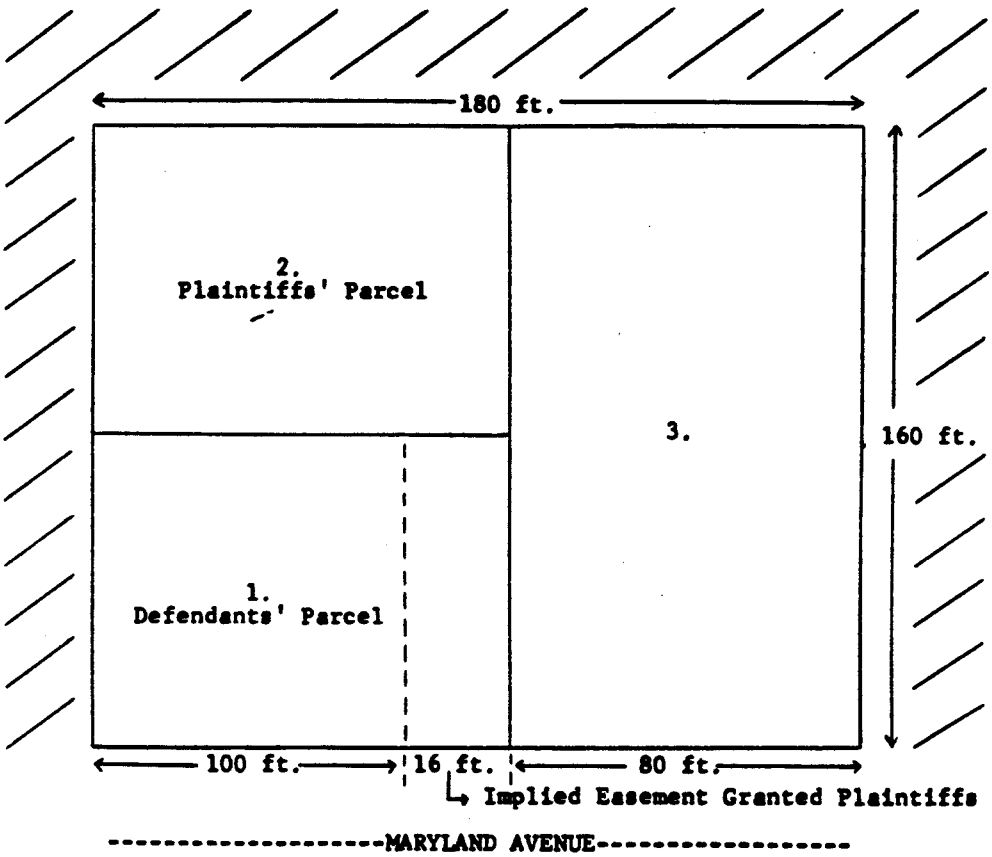
OGG, Presiding Judge.

The issue in this case is whether the facts justify the granting of an easement by implication. Both parties filed motions for summary judgment which resulted in a

judgment granting the plaintiffs/appellees Oliver H. Griffith and Josie Griffith an easement sixteen feet in width along the east side of the property owned by the defendants/appellants Ella Porter and James R. Pryor.

Defendants appeal this judgment, alleging that it was error for the trial court to grant the plaintiffs an easement by implication over their property.

The present situation can best be illustrated by a sketch showing the tract of land in question and how the various conveyances of parcels of land within the tract worked to change the ownership of the different parcels over the years.



1944 - Original grantors Juan and Apolonia Hidalgo acquired property

1948 - 1950 - In a series of conveyances Juan Hidalgo conveyed Parce #1 to his son Christopher Hidalgo

1950 - Juan Hidalgo conveyed Parcels #2 and #3 to his son John R. Hidalgo

1953 - John Hidalgo conveyed Parcel #3 to Harold and Mamie Smith

1971 - Christopher Hidalgo conveyed Parcel #1 to Ella Porter

1972 - John Hidalgo conveyed Parcel #2 to Oliver and Josie Griffith, the plaintiffs

Looking at the sketch and the accompanying list of conveyances, one can see that the parcels of land owned by the plaintiffs and defendants were originally owned by Juan Hidalgo, the owner of the whole tract until 1948. Juan Hidalgo conveyed different parcels within the tract to his two sons, John and Christopher Hidalgo; John subsequently becoming the plaintiffs grantor and Christopher the defendants' grantor.

[1-3] We have found no cases in Arizona which discuss easements by implication and we thus look to other sources of law. The essential elements of an easement by implication are set out in *Wetmore v. Ladies of Loretto, Wheaton*, 73 Ill. App.2d 454, 220 N.E.2d 491 (1966), as follows:

> "(1) The existence of a single tract of land so arranged that one portion of it derives a benefit from the other, the division thereof by a single owner into two or more parcels, and the separation of title; (2) before the separation occurs, the use must have been long, continued, obvious or manifest, to a degree which shows permanency; and (3) the use of the claimed easement must be essential to the beneficial enjoyment of the parcel to be benefited." (Citations omitted)

In addition to these three requirements, an implied easement can only be made in connection with a conveyance; that is, an implied easement is based on the theory that whenever one conveys property he includes or intends to include in the conveyance whatever is necessary for its beneficial use and enjoyment. 25 Am.Jur.2d *Easements* § 24 (1966). Whether an easement arises by implication depends on the intent of the parties which must clearly appear to sustain an easement by implication. *Peet v. Schurter*, 142 Cal.App.2d 237, 298 P.2d 142 (1956); 28 C.J.S. *Easements* § 30 (1941).

[4] Looking at the circumstances in the present case, the plaintiffs do not meet the requirements necessary for an easement to be implied over the defendants' property. The plaintiffs bought their parcel from John Hidalgo one year after the defendants had bought theirs from Christopher Hidalgo. Second, the defendants could never have intended an easement over their land since they were never in privity with the plaintiffs as to any conveyance. In *Boyd v. McDonald*, 81 Nev. 642, 408 P. 2d 717 (1965), the court stated:

> "We emphasize that an easement by implication is, in effect, an easement created by law. It is grounded in the court's decision that as to a particular transaction in land, the owner of two parcels had so used one to the benefit of his other that, on selling the benefited parcel, a purchaser could reasonably have expected, without further inquiry, that these benefits were included in the sale."

The plaintiffs' parcel became landlocked when the grantor, John Hidalgo, sold parcel #3 to the Smiths in 1953. At that time John Hidalgo reserved no easement over parcel #3 nor over parcel #1, which is now owned by defendants. There is no evidence before us to indicate that John Hidalgo ever used defendants' parcel to his benefit. The plaintiffs, when purchasing their parcel from John Hidalgo, had no right to expect that an easement was implied over the defendants' property when the defendants were strangers to that transaction.

Although the matter was never presented in this case, the appellees may have a remedy through the condemnation of a private way of necessity pursuant to §§ 12-1201 and 12-1202 of the Arizona Revised Statutes,

Reversed.

DONOFRIO and FROEB, JJ., concur.

210 P.2d 593

SOLANA LAND CO. v. MURPHEY et ux.

No. 5057.

Supreme Court of Arizona.

Oct. 17, 1949.

The Solana Land Company, an Arizona corporation, brought action against John W. Murphey and Helen G. Murphey, husband and wife, under eminent domain statute allowing condemnation of a "private way of necessity."

The Superior Court of Pima County, M. T. Phelps, J., rendered a judgment granting plaintiff only an easement in gross or a personal privilege, and the plaintiff appealed, and defendants cross-appealed.

The Supreme Court, Udall, J., reversed the judgment, holding that plaintiff was entitled to an appurtenant easement as to all realty owned by it, and not merely to an easement in gross or a personal privilege.

1. Judgment ⇐21

A judgment should be certain in itself or capable of being made so by proper construction. A.C.A.1939, § 21-1219.

2. Judgment ⇐21

A judgment should fix clearly the rights and liabilities of the respective parties, and be such as the parties may readily understand it, and determine the controversy in order to discourage unnecessary future litigation. A.C.A.1939, § 21-1219.

3. Eminent domain ⇐317(1)

In action under eminent domain statute allowing condemnation of a private way of necessity, judgment which gave plaintiff an easement over defendants' realty only with respect to part of section of realty owned by plaintiff did not grant plaintiff an "appurtenant easement" to section owned by plaintiff, but merely an "easement in gross", since no dominant ten-

ement existed. A.C.A.1939, § 27-904; Const. art. 2, § 17.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Appurtenant Easement" and "Easement in Gross".

4. Easements ⇐3(1)

In an "appurtenant easement" there must be a dominant tenement to which the right belongs and a servient tenement on which the obligation rests.

5. Easements ⇐3(1)

An "appurtenant easement" is an easement which inheres in the land to which it is appurtenant, is necessary to its enjoyment, and passes with the land, while an "easement in gross" is a merely personal privilege, which dies with the person who may have acquired it.

6. Eminent domain ⇐61

Where it appears that a private right of way, though only for direct benefit of a private party, is ultimately for purpose of development of resources of the state as a whole, and tends to prevent a private individual from bottling up and rendering ineffective a portion of state's resources, it is, in effect, promotive of the "public welfare", and thus authorized by the Constitution. A.C.A.1939, § 27-904; Const. art. 2, § 17.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Public Welfare".

7. Eminent domain ⇐61, 317(1)

Only a person owning or having a beneficial use in land that is "land-locked" may bring an action to condemn a private way of necessity across the land of another, and therefore where an easement is granted under the statute, it must be appurtenant to plaintiff's land as distinguished from a mere personal privilege. A.C.A.1939, § 27-904; Const. art. 2, § 17.

8. Eminent domain ⇐317(1)

Where plaintiff sought an appurtenant easement across defendants' land under eminent domain statute allowing condemnation of the private way of necessity, plaintiff was entitled to an appurtenant way of necessity or no appurtenant way of necessity dependent on whether a necessity was established, and should not have been granted merely an easement in gross or a personal privilege. A.C.A.1939, § 27-904; Const. art. 2, § 17.

9. Courts ⇐96(1)

Opinion of Supreme Court of Washington with respect to condemnation of a private way of necessity, though not controlling on Arizona Supreme Court, was peculiarly persuasive where it contained sound reasoning, and where Arizona constitutional provision on eminent domain was obviously copied from the Constitution of Washington. A.C.A.1939, § 27-904; Const. art. 2, § 17.

10. Eminent domain ⇐317(1)

Where plaintiff in action under eminent domain statute allowing condemnation of a private way of necessity established a right to a way of necessity over defendants'

land, plaintiff was entitled to have such easement adjudged appurtenant to all of its holdings in section and not merely to a part of its holdings in that section. A.C.A. 1939, § 27-904; Const. art. 2, § 17.

11. Eminent domain ⇐317(1)

Character of private way of necessity under eminent domain statute was not affected by fact that it might be but little used and was at present mainly convenient for the use of the plaintiff, nor by the fact that total cost of condemnation as well as that of construction and maintenance of highway strip fell on those most immediately concerned instead of on the public at large. A.C.A.1939, § 27-904; Const. art. 2, § 17.

12. Eminent domain ⇐61

In determining whether a private way of necessity exists within meaning of eminent domain statute, prospective use may be considered, as well as present necessity. A.C.A.1939, § 27-904; Const. art. 2, § 17.

13. Eminent domain ⇐68

On matter of selection of route of private way of necessity under eminent domain statute, the condemnor makes the initial selection, and, in absence of bad faith, oppression or abuse of power, condemnor's selection of route will be upheld by the courts. A.C.A.1939, § 27-904; Const. art. 2, § 17.

14. Eminent domain ⇐61

To entitle a landowner to a "private way of necessity" across intervening land to a public road under eminent domain statute, he need not show that he has no outlet, but only that he has no adequate and convenient outlet, and he need not show an absolute necessity for the taking, but is required only to show a reasonable necessity. A.C.A.1939, § 27-904; Const. art. 2, § 17.

See Words and Phrases, Permanent Edition, for other judicial constructions and definitions of "Private Way of Necessity".

15. Eminent domain ⇐61

Plaintiff was not precluded from obtaining a private way of necessity over defendants' lands under eminent domain statute on ground that plaintiff had an appropriate and expedient method of obtaining a means of ingress and egress to plaintiff's realty by petitioning board of supervisors for establishment of a county highway, where the lands in question were yet undeveloped and not ready for occupancy. A.C.A.1939, § 27-904, 59-601; Const. art. 2, § 17.

16. Eminent domain ⇐61

Where land of plaintiff was, for all practical purposes, land-locked at time plaintiff instituted action under eminent domain statute allowing condemnation of a "private way of necessity", because there was no way, without trespassing, that one could have ingress and egress to plaintiff's land by automobile, plaintiff was entitled to a "private way of necessity". A.C.A.1939, § 27-904; Const. art. 2, § 17.

Richard H. Chambers, of Tucson, attorney for appellant.

Darnell, Robertson & Holesapple, of Tucson, attorneys for appellees.

UDALL, Justice.

Plaintiff, Solana Land Company, a property holding corporation (principally owned by the Martin Schwerin family of Tucson, Arizona), is appealing from a judgment it obtained against John W. Murphey and Helen G. Murphey, his wife, defendants (appellees), condemning an easement for road purposes over certain real property owned by the latter. Plaintiff maintains that the judgment procured is not clear and should be amended to provide that the easement granted be appurtenant to all of plaintiff's land in section 7. The defendants by their cross-appeal contend it was error for the trial court to have granted plaintiff any easement.

This action was brought under the eminent domain statute (Sec. 27-904, A.C.A.1939) allowing condemnation of a "private way of necessity." The plaintiff company owns all of section 7, township 13 south, range 14 east of the G. & S. R. B. & M. in Pima County, Arizona. The defendants own substantially all of sections 6, 8 and 18 of the same township, which sections bound section 7 on the north, east and south. These sections lie in the westerly part of the Catalina Foothills district which forms a part of the northern suburban area of the City of Tucson. None of the land in question is agricultural and as grazing lands the holdings of both plaintiff and defendants are of comparatively small value. However, largely due to the development efforts of the defendants the area now is of great value in the current market as sites for exclusive homes. Practically all of section 17 in this township was subdivided and sold by defendants and many fine homes have been constructed thereon. Section 7 (plaintiff's land) is wholly undeveloped and, with some slight exceptions, this is true of defendants' three adjoining sections—6, 8 and 18.

The purpose of plaintiff's action was to condemn a private way of necessity (310 feet long from east to west and 60 feet in width from north to south) in the extreme southwest corner of defendants' section 8, in order to obtain an appurtenant easement of ingress and egress for plaintiff's section 7 to connect with a county highway known as Camino Miravel which crosses into section 8 at this point.

The principal paved road serving this immediate area is an extension of North Campbell Avenue (a main Tucson thoroughfare) which runs northerly across sections 17, 8 and 5 to the base of the Catalina Mountains. Camino Miravel branches off from Campbell Avenue within the north half of section 17, crossing into section 8 at a point 310 feet east of the section corner common to sections 7, 8, 17 and 18 and continuing thence northerly across section 8, but not touching plaintiff's section 7 at any

point. Both of these roads were originally constructed at considerable expense by defendants. Later, however, but long prior to the filing of this action these roads were legally dedicated and are now properly established county highways with Pima County assuming the burden of maintenance. It was shown that there is one other possible route via Rudasill Road that might be used by plaintiff in getting to and from its land. About one mile west of section 7 is Oracle Road, otherwise known as the Tucson-Florence Highway, which is paved and runs north and south. Dedicated along the east-west center line of section 12 of the adjoining township, from Oracle Road to the west boundary of plaintiff's section 7, is Rudasill Road. It has been improved from Oracle Road to a point within about one-third mile of the west boundary of section 7, where the improvement stops and the road has no existence on the ground beyond that point. The unimproved but dedicated portion crosses several small arroyos, hence it cannot now be traversed in an automobile, though the trial court found after a personal inspection on the ground, that it could readily be made passable at a very nominal expense. It is thus apparent that section 7 was, for all practical purposes, landlocked at the time this action was brought, as there was no way, without trespassing, that one could have ingress and egress to plaintiff's land by automobile. Defendants also urge that North First Avenue might be extended up the range line (west boundary of sections 18 and 7) to furnish plaintiff a means of egress and ingress, however, this proposed route is as yet non-existent and could only be established at considerable expense.

While no findings of fact were requested or made, still it is apparent from the views expressed by the court, as the trial progressed, that it was of the opinion the Rudasill-Oracle Road route presented plaintiff with an adequate means of ingress and egress for ninety-five per cent of its land in section 7. However, persons going this route would be compelled to travel some four miles farther to reach the commercial and social center including the school house of district 16 (of which the area in question is a part) located at or near the intersection of North Campbell Avenue and River Road.

Due to the fact that a deep arroyo running from the northeast to the southeast cuts across the southeast quarter of plaintiff's section 7, the court was further of the opinion that there only existed a legal "necessity" for granting plaintiff an easement across defendants' section 8, to serve that small area (20 or 30 acres) lying in the southeast corner of plaintiff's section. However in the judgment that was finally entered even this relief was not granted.

The proposed judgment submitted by plaintiff decreed: "* * * that the easement on and over the property above described shall be held appurtenant to * * * section 7, * * * as a private way of necessity for road purposes only."

This reference to the dominant estate owned by plaintiff was, upon defendants' motion, completely stricken from the judgment finally entered and the trial court later denied plaintiff's motion to modify said judgment by reinserting the quoted paragraph. These rulings are complained of by plaintiff's assignments of error.

[1,2] We agree with plaintiff's first proposition of law: "A judgment or decree should be definite and certain in itself, or capable of being made so by proper construction. It should fix clearly the rights and liabilities of the respective parties to the cause, and be such as the parties readily may understand it, and determine the controversy at hand in order to discourage unnecessary future litigation." See 49 C.J. S., Judgments, § 72; Sec. 21-1219, A.C.A. 1939; Peterson v. Overson, 52 Ariz. 203, 79 P.2d 958.

[3–5] An examination of the final judgment entered convinces us that it cannot possibly be construed as granting to plaintiff an appurtenant easement to section 7 because some of the essential qualities of such an easement are missing. See Day v. Buckeye Water Conservation & Drainage Dist., 28 Ariz. 466, 237 P. 636; 19 C.J., Easements, § 2, p. 864; 28 C.J.S., Easements, § 1. With an appurtenant easement two distinct tenements are involved, the dominant to which the right belongs and the servient upon which the obligation rests. As no dominant tenement in the instant case remains the right actually granted to plaintiff was a mere easement in gross or personal privilege. Ballard on the Law of Real Property, Vol. 2, Sec. 176, p. 193, best distinguishes between ways appurtenant or in gross. We quote: "A right of way appurtenant is a right which inheres in the land to which it is appurtenant, is necessary to its enjoyment, and passes with the land, while a right of way in gross is a mere personal privilege, which dies with the person who may have acquired it. Ways are said to be appendant or appurtenant when they are incident to an estate, one terminus being on the land of the party claiming. They must inhere in the land, concern the premises, and be essentially necessary to their enjoyment." See also Fisher v. Fair, 34 S.C. 203, 13 S.E. 470, 14 L.R.A. 333; 28 C.J.S., Easements, § 4; 17 Am.Jur., Easements, §§ 10, 11 and 12; Thompson on Real Property, Permanent Edition, Vol. 1, §§ 321, 322 and 323; Tiffany on Real Property, Second Edition, Vol. 2, § 350; Restatement of the Law of Property, Servitudes, §§ 453 and 454.

[6] The right to take private property for "private ways of necessity" stems from Art. 2, Sec. 17 of the Constitution of Arizona. This provision was held to be not self executing in the case of Inspiration Consol. Copper Co. v. New Keystone Copper Co., 16 Ariz. 257, 144 P. 277. Thereafter an enabling statute (section 27-904 A.C.A.1939) was adopted by the legislature. The only justification, constitutional-

ly, for this statute is that the public welfare is served. Lewis, Eminent Domain, Third Edition, Vol. 1, § 250. This is emphasized in the decision of Cienega Cattle Co. v. Atkins, 59 Ariz. 287, 126 P.2d 481, 484. It is there said: "* * * when it appears that a private right of way, although only for the direct benefit of a private party, is ultimately for the purpose of the development of the resources of the state as a whole, and tends to prevent a private individual from bottling up and rendering ineffective a portion of the resources of the state, it is, in effect, promotive of the public welfare, and thus within the constitutional provision." The pertinent parts of this enabling statute (Sec. 27-904) reads: *"An owner or one entitled to the beneficial use of land, * * * which is so situated with respect to the land of another that it is necessary for its proper use and enjoyment to have and maintain a private way of necessity over, across, through, and on said premises, may condemn and take lands of such other,* sufficient in area for the construction and maintenance of such private way of necessity; * * * The term 'private way of necessity' as used herein shall mean a right-of-way on, over, across, or through the land of another for means of irgress and egress, and the construction and maintenance thereon of roads, * * * for * * * domestic * * * purposes." (Emphasis supplied.)

[7, 8] The italicized parts of this statute clearly indicate the legislative intent that only a party owning or having a beneficial use in land that is "land-locked" may bring an action to condemn a private way of necessity across the land of another. It therefore logically follows that where an easement is granted under the statute it must be appurtenant to plaintiff's land as distinguished from a mere personal privilege. Here plaintiff sought an appurtenant easement, the judgment granting a mere personal privilege was but half a loaf. It was entitled to the whole loaf or none dependent upon whether a "necessity" was established.

It is apparent the trial court found a "necessity" exists for a roadway out over section 8 to serve some part of section 7. The question then arises as to whether the court can limit the use of the condemned right of way to only part of such land. The following proposition of law succinctly states plaintiff's position: "Upon a condemnation of a private way of necessity, if necessity under the law is shown for a part of a tract of the one who seeks to condemn, and the defendant is being compensated for his entire loss, the decree should permit use by plaintiff's whole tract, and, therefore, the dominant easement should be made appurtenant to plaintiff's whole tract." Only one reported case has been cited where it was sought to limit the use of the condemned right of way to part

of plaintiff's holdings. This is the case of State ex rel. Grays Harbor Logging Co. v. Superior Court of Chehalis County, 82 Wash. 503, 144 P. 722. There the plaintiff sought a right of way for a logging road. Admittedly the plaintiff had access to a water outlet for one of its remote tracts, but did not have it for other tracts. The court refused to exclude the tract with admitted ingress and egress from using the condemned right of way.

[9] While the opinion from the Supreme Court of Washington is not controlling, it is peculiarly persuasive both by reason of its sound reasoning as well as the fact that our constitutional provision on eminent domain was obviously copied from the constitution of that state. Cienega Cattle Co. v. Atkins, supra. A holding in this case contrary to that in the Washington case would breed future litigation as it would be wholly impracticable of enforcement to draw an artificial line somewhere through section 7 and say to future occupants, on either side of the line, "This route and this alone you are at liberty to use." Also if the judgment as entered were permitted to stand it would impose an intolerable burden upon defendants of policing the strip of road in question to confine its usage to that of plaintiff alone. Furthermore it would tend to "bottle up" and render ineffective a portion of the resources of the state. Unlocking these resources was the sound public policy underlying the decision in Cienega Cattle Co. v. Atkins, supra. With its salubrious climate which attracts thousands of people to the Tucson area it may well be said that suitable roads to prospective home sites in the Catalina Foothills means as much to Pima County as an irrigation canal in the agricultural counties of the state, or as the lumbering industry does to the state of Washington.

[10, 11] Plaintiff having established a right to a "way of necessity" over section 8 it was entitled to have such easement adjudged appurtenant to all of its holdings in section 7. In fact we are of the opinion that as applied to a roadway established under the condemnation statute (Sec. 27-904) it becomes an open public way which may be traveled by any person who desires to use it. Lewis, Eminent Domain, Third Edition, Vol. 1, Sec. 260. Hence the term "private way of necessity" is really a misnomer. Sherman v. Buick, 32 Cal. 241, 91 Am.Dec. 577. Its character is unaffected by the circumstances that it may be but little used and is at present mainly convenient for the use of the plaintiff, nor by the circumstances that the total cost of condemnation as well as the construction and maintenance of the highway strip in question has fallen upon those most immediately concerned instead of the public at large.

[12] By their cross-appeal the defendants urge that the plaintiff failed to establish a "necessity" for condemning this right of way. The trial court in entering judg-

ment for plaintiff necessarily found against defendants on this issue and there is substantial evidence to sustain its conclusion. While it is true that section 7 was unoccupied and unimproved at the time of trial, its present use is not the only test by which to determine the existence of a "necessity." Prospective use may be considered as well as present necessity. The Supreme Court of the United States in the case of Rindge Company v. Los Angeles County, 262 U.S. 700, 43 S.Ct. 689, 693, 67 L.Ed. 1186, at page 1193, has held: "In determining whether the taking of property is necessary for a public use not only the present demands of the public, but those which may be fairly anticipated in the future, may be considered." See also Martin v. Portland Pipe Line Co., 1 Cir., 158 F.2d 848.

[13] On the matter of selection of the route to be condemned the condemnor makes the initial selection and in the absence of bad faith, oppression or abuse of power its selection of route will be upheld by the courts. State ex rel. Polson Logging Co. v. Superior Court for Grays Harbor et al., 11 Wash.2d 545, 562, 119 P.2d 694, 702.

[14] Furthermore, for a landowner to condemn a right-of-way across intervening land to a public road, he need not show that he has no outlet, but only that he has no adequate and convenient one. Brady v. Correll, 20 Tenn.App. 224, 97 S.W.2d 448. In other words the condemnor need not show an absolute necessity for the taking, a reasonable necessity being sufficient. State ex rel. Postal Telegraph-Cable Co. v. Superior Court, 64 Wash. 189, 116 P. 855; Johnson v. Consolidated Gas, Electric Light & Power Co., 187 Md. 454, 50 A.2d 918, 170 A.L.R. 709.

[15, 16] There is no merit to defendants' contention that section 59-601 A.C.A. 1939 (Article 6, County Highways), gives to plaintiff an appropriate and expedient method of obtaining a means of ingress and egress to its property by petitioning the board of supervisors for the establishment of a county highway. It is a well known fact that in subdivision areas county roads follow but rarely precede development and occupancy. Hence such a request to the county authorities at this stage would be fruitless. Furthermore providing for condemnation at the instance of a private party the framers of our constitution as well as the legislature affirmatively rejected such a contention.

It is conceded that the defendants have been fully compensated for the strip condemned. A land appraiser testified it had a value of $750 and that was the figure the court adopted. Defendant John W. Murphey concisely states his position in these words: "I think Mr. Kime set a very fair value on it. I am not interested in the value of this land. I would give it to Mr. Schwerin if it was right and proper. That is the thing. I don't want any money. That doesn't enter into this deal. I just don't want him to use my subdivision as a main

entrance to his when I spent one hundred thousand dollars making it."

The judgment of the lower court is reversed with directions to amend the judgment so as to make the condemned right-of-way appurtenant to section 7.

LA PRADE, C. J., STANFORD and DE CONCINI, JJ., and JOHNSON, Superior Court Judge, concur.

PHELPS, J., being the trial judge, the Honorable J. MERCER JOHNSON, Judge of the Superior Court of Pima County, was called to sit in his stead.